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IN THE SUPREME COURT OF THE
STATE OF UTAH

STATE OF UTAH,)	
Plaintiff-Respondent,)	
-vs.-)	Case No. 14560
ELBERT JUNIOR ROSS,)	
Defendant-Appellant.)	

BRIEF OF APPELLANT

APPEAL FROM THE JUDGMENT OF THE SECOND JUDICIAL DISTRICT
COURT, IN AND FOR WEBER COUNTY, STATE OF UTAH, THE HONORABLE JOHN
F. WAHLQUIST, JUDGE, PRESIDING.

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R. refers to Record	
Tr. refers to Transcript	

IN THE SUPREME COURT OF THE
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STATE OF UTAH,)	
Plaintiff-Respondent,)	
-vs.-)	Case No. 14560
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Defendant-Appellant.)	

BRIEF OF APPELLANT

STATEMENT OF THE NATURE OF THE CASE

The appellant, Elbert Junior Ross, was convicted in the Second Judicial District Court, in and for Weber County, State of Utah, of the crime of Distribution of a Controlled Substance for Value in violation of Utah Code Annotated, 58-37-8 (1953). The Honorable John F. Wahlquist, Judge, presided. From the judgment of conviction the defendant brings this direct appeal.

DISPOSITION IN THE LOWER COURT

The jury impaneled in the matter found the defendant guilty of the crime of Distribution of a Controlled Substance for Value. Subsequently, the trial court sentenced appellant to serve an indeterminate sentence in the Utah State Prison of from one to fifteen years as provided by law.

RELIEF SOUGHT ON APPEAL

Appellant seeks reversal of the verdict and judgment of the trial court and remand of this matter for a new trial.

STATEMENT OF FACTS

On December 8, 1975, at approximately 11:12 a.m., Ken Goode and Charlene Goode, undercover narcotics operatives for the Ogden City Police, went to a residence located at 804 West 27th Street, Ogden, Utah, for the purpose of making a "controlled buy" of Heroin. (Tr. 5,19,83).

Upon trial in this matter, the only testimonial evidence offered by the prosecution with respect to the events that subsequently transpired within the above residence was the testimony of Ken and Charlene Goode. Said testimony was to the effect that, upon entering said residence, they encountered the appellant and

requested of him that he sell them some Heroin. According to the Goodes, the defendant-appellant, Elbert Ross, then sold them three "balloons" of a substance later identified as Heroin for \$75.00. No one other than the Goodes observed the alleged transaction nor the defendant. The Goodes then proceeded to inject the heroin from two of the balloons into their veins. One balloon was allegedly secreted and subsequently delivered to the authorities. (Tr. 4-5, 59,88-89). None of the "buy money" was ever recovered from defendant-appellant.

From the testimony of the Goodes, and the testimony of other witnesses called at trial herein, it was established that:

1. Mr. Goode was a twice convicted felon (Tr. 50-51) and Mrs. Goode had also been previously convicted of a Felony (Forgery) (Tr. 83).
2. Both Mr. and Mrs. Goode were "former" Heroin addicts who were, at the time of the alleged buy, under the auspices of a federally financed Methadone Maintenance program. (Tr. 90).
3. Both the Goode's had recently been charged with new felony charges of Possession with Intent to Distribute for Value and Receiving Stolen Property arising out of the burglary of a drug store located at Washington Terrace, Utah. (Tr. 51,68-69,84).
4. Mrs. Goode was an admitted former prostitute. (Tr. 92).

5. Both Goodes had, on the occasion of the alleged "buy", injected Heroin into their veins. (Tr. 4-5, 59, 88-89).

6. Ken Goode was a major "dealer" in narcotic drugs. (Tr. 112).

7. Both Goodes were testifying in this and related matters in expectation of some substantial consideration from the State of Utah. (Tr. 67,77-80,94).

8. Both Goodes invoked their privilege of self-incrimination during trial. (Tr. 70,93).

Upon trial in the matter, subsequent to both parties resting their respective cases, the jury retired to consider a Verdict. Upon deliberation, the jury returned a verdict against appellant of Guilty of Distribution for Value of a Controlled Substance, and judgment and sentence were duly entered by the trial court accordingly. (Tr. 138, R. 81). From that judgment and verdict the defendant-appellant brings this direct appeal.

ARGUMENT

POINT I

THE EVIDENCE PRESENTED AT TRIAL IN THIS MATTER WAS
LEGALLY INSUFFICIENT TO SUPPORT DEFENDANT'S CONVICTION

It is well established as a matter of law that, in a criminal prosecution, the State must establish beyond all reasonable doubt all of the elements of the offense charged, and that in the absence of such degree of proof the defendant is entitled to acquittal. Holt v. United States, 218 U.S. 245, 54 L. Ed. 1021, 31 S. Ct. 2 (); State v. Allgood, 28 Utah 2d 119, 499 P. 2d 269 (1972); State v. Shonka, 3 Utah 2d 124, 279 P. 2d 711 (1955); State v. Sullivan, 6 Utah 2d 110, 307 P. 2d 212 (1957); State v. Danks, 10 Utah 2d 162, 350 P. 2d 146 (1960). It is further well established that the Supreme Court, in reviewing the legal sufficiency of the evidence submitted to the trier of fact, may set aside a verdict of guilty where the evidence was so inconclusive and unsatisfactory that reasonable men could and should have entertained reasonable doubt that the defendant committed the crime charged. (State v. Allgood, supra; State v. Shonka, supra; State v. Sullivan, supra; State v. Danks, supra.)

In State v. Sullivan, supra, Mr. Justice Crockett, speaking for the Court, enunciated fully the above standard:

The presumption of innocence and the requirement of proof of guilt beyond any reasonable doubt, are indeed of the utmost importance as safeguards against the possibility of convicting the innocent. We scrupulously adhere to them notwithstanding the difficulties encountered and the possibility that some guilty may escape punishment. It is an ancient and honored adage of our law that it is better that ten guilty go free than that one innocent person be punished. We appreciate the wisdom of that maxim and the importance of according every proper consideration to those accused of crime . . .

Before a verdict may properly be set aside, it must appear that the evidence was so inconclusive or unsatisfactory that reasonable minds acting fairly upon it must have entertained reasonable doubt that defendants committed the crime. Unless the evidence compels such conclusion as a matter of law, the verdict must stand. (6 Utah 2d pp. 113-114).

Similarly, in State v. Danks, supra, Mr. Justice Callister

wrote:

Before setting aside a jury verdict it must appear that the evidence was so inconclusive or unsatisfactory that reasonable minds acting fairly upon it must have entertained reasonable doubt that defendant committed the crime. (10 Utah at 164).

This court has also stated:

If the State's evidence is so inherently improbable as to be unworthy of belief, so that upon objective analysis it appears that reasonable minds could not believe beyond a reasonable doubt that the defendant was guilty, the jury's verdict cannot stand. Conversely, if the State's

evidence is such that reasonable minds could believe beyond a reasonable doubt that the defendant was guilty, the verdict must be sustained. State v. Mills, 122 Utah 306, 249 P. 2d 211 (1952). (See also State v. Horne, 12 Utah 2d 162, 364 P. 2d 109 (1961) for the same rule).

Finally, in what appear to be some what variant statements of essentially the same principle enunciated in the above cited cases, this Court has said that a jury verdict of guilty may be set aside when "taking the evidence in the light most favorable to the verdict," the "findings are unreasonable." State v. Berchtold, 11 Utah 2d 208, 357 P. 2d 183 (1960). Alternatively, if the verdict is "supported by sufficient competent evidence" a new trial is to be denied. State v. Rivenburgh, 11 Utah 2d 95, 355 P. 2d 689 (1960). See also State v. Schad, 24 Utah 2d 255, 470 P. 2d 246 (1970) for the rule that there must be a "reasonable basis" for the verdict.

It is apparent from these various statements of the law that this court does clearly have the power to reverse and remand in an appropriate case and to direct that a new trial be had.

This court has said that:

We are not unmindful of the settled rule that it is the province of the jury to weigh the testimony and determine the facts. Nevertheless, we cannot escape the responsibility of judgment upon whether under the evidence, a jury could, in reason, conclude that the defendant's guilt was proved beyond a reasonable doubt. State v. Williams, 111

Utah 379, 180 P. 2d 551, 555 (1947).

Applying the rationale of the above cited authorities to the facts in this case, it is clear that the evidence presented herein was not legally sufficient, upon the above enunciated "reasonable man standard" to warrant a conviction, and this Court could and should reverse the verdict and judgment of the trial court.

As noted above, the State's case against Elbert Ross is founded, in most if not all particulars, upon the testimony of Ken and Charlene Goode. Only they purportedly witnessed the alleged "buy" and testified to same, and only they identified the defendant at trial.

As regards the above witnesses it was clearly established at trial that:

1. Mr. Goode was a twice convicted felon (Grand Larceny-Possession) (Tr. 50-51) and Mrs. Goode had also been previously convicted of a Felony (Forgery) (Tr. 83).

2. Both Mr. and Mrs. Goode were "former" Heroin addicts who were, at the time of the alleged buy, under the auspices of a federally financed Methadone Maintenance program. (Tr. 90).

3. Both the Goode's had recently been charged with new felony charges of Possession with Intent to Distribute for Value and Receiving Stolen Property arising out of the burglary of a drug store located

at Washington Terrace, Utah. (Tr. 51,68-69,84).

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5. Both Goodes had, on the occasion of the alleged "buy", injected Heroin into their veins. (Tr. 4-5,59,88-89).

6. Ken Goode was a major "dealer" in narcotic drugs. (Tr. 112).

7. Both Goodes were testifying in this and related matters for some substantial consideration from the State of Utah. (Tr. 67, 77-80,94).

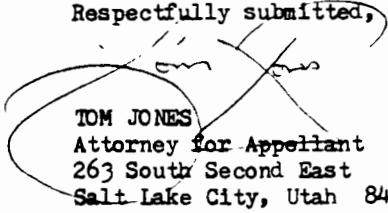
8. Both Goodes invoked their privilege of self-incrimination during trial. (Tr. 70, 93).

From the above, it should be abundantly clear that the Goodes were clearly, as noted in the prosecutor's unintentional pun made in his opening statement herein, "not very good people." And, although they were indisputedly competent witnesses under our law (See in this regard Utah Code Annotated, Section 78-24-1 (1953)), their testimony was thoroughly and clearly impeached and unworthy of belief. No "reasonable man", upon the standard above cited, could convict the defendant, Elbert Ross, upon the testimony of such witnesses, particularly in view of all impeaching matters brought to the jury's attention.

CONCLUSION

The verdict of guilty in the instant case was clearly not supported by the believable evidence. This court should reverse the verdict and judgment of the trial court and remand this matter for a new trial.

Respectfully submitted,


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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Brief of Appellant was duly served on counsel for the respondent, Robert B. Hanson, Utah State Attorney General, 236 State Capitol Building, Salt Lake City, Utah, by hand delivering three (3) copies thereof this 27th day of May, 1977.


TOM JONES